Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1996

BYRON STILL,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

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48 pp

QUESTIONS PRESENTED

1. Whether, consistent with Rule 11 and due process, the failure to advise a defendant of the statutory minimum sentence on one count of a multi-count guilty plea vitiates the entire guilty plea?

2. Does the change in law created by *Bailey v. United States*, ____ U.S. ____, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995) constitute a "fair and just reason" to allow a defendant to withdraw a guilty plea prior to sentencing?

PARTIES

The parties are the United States and the petitioner Byron Still.

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October Term, 1996

BYRON STILL,
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OPINIONS BELOW

The opinion of the court of appeals (App.A) is reported at 102 F.3d 118 (5th Cir. 1996).

JURISDICTION

The court of appeals entered its judgment on December 10, 1996. Pursuant to 28 U.S.C. 1254(1), Still invokes the jurisdiction of the Court to review the judgment of a court of appeals in a criminal case.

STATUTORY PROVISIONS

Federal Rules of Criminal Procedure, Rule 11(c)(1)

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense;

Federal Rules of Criminal Procedure, Rule 32(e)

(e) If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason. At any later time, a plea may be set aside only on direct appeal or by motion under 28 U.S.C. §2255.

18 U.S.C. §924(c)(1)

Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous

weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assult weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

STATEMENT OF THE CASE

On March 17, 1995, Still was charged with a conspiracy to distribute cocaine in violation of 21 U.S.C. §846 (Count 1); possession of cocaine with intent to distribute in violation of 21 U.S.C. §841(a)(1) (Count 2); using and carrying a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. §924(c)(1) (Count 3); and with money laundering under 18 U.S.C. §§1956(a)(1)(A)(i) and 1956(a)(2) (Counts 4, 5, and 6). Still's wife was also charged as a co-defendant under Counts 1 and 2. On March 24, 1995, Still

entered a plea of not guilty.

At a rearraignment of August 31, 1995, Still pleaded guilty to the six counts of the indictment in exchange for the dismissal of the charges against his wife. At the Rule 11 plea colloquy, the district court advised Still that the mandatory minimum sentence under Counts 1 and 2 was five years imprisonment. Still was also advised by his lawyer[1] and government counsel that he faced a sentence of between seventy and eighty-seven months under the Sentencing Guidelines.

On December 6, 1995, the district court conducted a sentencing hearing and found under "*relevant conduct*" that Still had to be sentenced on the basis of five kilograms of cocaine instead of the four kilograms that had been seized at his house during his arrest. This finding triggered the application of 21 U.S.C. §841(b)(1)(A) and increased the minimum sentence to ten years under Count 1. Thus, this statutory minimum invalidated the Guideline projection of seventy to eighty-seven months that had been given to Still at the time of his plea. No one, however, advised him of this material change, and sentencing was continued until the next day.

On December 7, 1995, the district court rescheduled sentencing again, this time to determine the effect of *Bailey v. United States*, ____ U.S. ____, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995). Still then moved to withdraw the guilty plea to the gun charge based upon *Bailey*. On December 21, 1995, the district court denied Still's motion, finding that *Bailey*

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[1] Still was represented by different counsel in the trial court.

did not affect the guilty plea to the gun charge. Ultimately, the district court sentenced Still to one hundred twenty-one months as to Counts 1, 2, 4, 5, and 6 and sixty months on Count 3, to run consecutively.[2]

On December 10, 1996, the court of appeals held that the district court violated Rule 11 as to Count 1 by failing to inform Still of the correct mandatory minimum sentence. Accordingly, the court of appeals vacated the plea to Count 1 and remanded the case to the district court to enable Still to replead to this count. However, in spite of this finding, the court of appeals affirmed Still's sentence of one hundred eighty-one months on the remaining counts.

REASONS FOR GRANTING THE WRIT

A. *The failure to advise a defendant of the statutory minimum sentence on one count of a multi-count guilty plea vitiates the entire guilty plea .*

In *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463 (1970), this Court detailed the ramifications of a guilty plea:

> "That a guilty plea is a grave and solemn act to be accepted only with care and discernment has long been recognized. Central to the plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the

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[2] The court found a criminal history category of I, and an offense level of 32, after finding a quantity of 5 kilograms of cocaine, a 3 point increase for Still's role as a manager/supervisor, and a 3 point decrease for Still's acceptance of responsibility.

> indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so - hence the minimum requirement that his plea be the voluntary expression of his own choice. (Footnote omitted). But the plea is more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial - a waiver of his right to trial before a jury or a judge. Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady,* 397 U.S. at 748, 90 S.Ct. at 1468-69.

In *McCarthy v. United States,* 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969), this Court explained the role of Rule 11 in safeguarding the defendant's rights in making his plea. *McCarthy,* provides that,

> "Rule 11 expressly directs the district court to inquire whether a defendant who pleads guilty understands the nature of the charge against him and whether he is aware of the consequences of his plea." *McCarthy,* 394 U.S. at 464, 89 S.Ct. at 1170.

Thus, Rule 11 is designed to "assist the district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary." *McCarthy* 394 U.S. at 465, 89 S.Ct. at 1170. Since a guilty plea involves the waiver of such important constitutional rights, "if a defen-

dant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void." *McCarthy,* 394 U.S. at 466, 89 S.Ct. at 1171.

In affirming Still's plea to Counts 2 through 6, the Fifth Circuit reasoned, without precedent, that Rule 11(c) "by its terms does not contemplate overlap of the counts, but rather speaks in terms of individual 'charge[s] to which plea[s] [are] offered.' " *Still,* 102 F.3d at 123. Accordingly, the fact that Still was misinformed as to the minimum mandatory sentence he faced on Count 1 was of no consequence to his plea on the five remaining counts.[3] This interpretation of Rule 11 eviscerates its goal and is totally unrealistic. Still did not make six separate deals with the government when he agreed to plead guilty. He made one. He looked at the bottom line and understood that, in making this plea, he would face a minimum of five years incarceration. And because the guilty plea to Count 1 was part of a multi-count plea agreement, the statutory minimum of Count 1 became the statutory minimum for the entire plea. Clearly, the court of appeals' narrow interpretation contradicts this Court's mandate that a defendant's waiver of his constitutional rights be a "knowing, intelligent [act] done with sufficient awareness of the relevant circumstances and likely conse-

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[3] In a footnote, the court of appeals held that Still waived the issue of whether the Rule 11 error mandates vacating Still's plea to all six counts of the indictment since the issue was not raised and argued in the initial brief of the appeal. *Still,* 102 F.3d at 122, n. 7 However, the whole thrust of the initial brief was to allow Still to plead anew to the indictment because of the Rule 11 violation. The brief repeatedly asserted that the error required that the "conviction must be vacated, and [Still's] case must be remanded so that he may replead," and that Still must be allowed to "replead to the [indictment]." The initial brief argued that because a Rule 11 violation occurred as to Counts 1 and 2, Still should be allowed to withdraw his plea and replead to the indictment.

quences." *Brady*, 397 U.S. at 748, 90 S.Ct. at 1469. Since Still did not know the true consequences of his plea, Rule 11 requires vacating his conviction on each count so that he may replead to the indictment.

Other courts have provided the following directives with regard to Rule 11: that the district court must determine "whether the defendant's knowledge and comprehension of the full and correct information would have been likely to affect his willingness to plead guilty." *United States v. Johnson*, 1 F.3d 296, 302 (5th Cir. 1993) (en banc); that if the record reveals an oversight "influenced the defendant's decision to plead guilty" and "impaired his ability to evaluate with eyes open the direct attendant risks of accepting criminal responsibility," then the defendant's substantial rights would be affected. *United States v. Padilla*, 23 F.3d 1220, 1222 (7th Cir. 1994). Clearly, the Fifth Circuit's narrow view of Still's understanding of his plea does not comport with the more realistic view, as outlined above, of requiring Still to *fully* understand the direct consequences of his plea.

The decision below actually conflicts with the Fifth Circuit's own jurisprudence. In *United States v. Bounds*, 943 F.2d 541 (5th Cir. 1991), *cert. denied*, ____ U.S. ____, 114 S.Ct. 135, 126 L.Ed.2d 99 (1993), the defendant pled guilty to one count of conspiracy to manufacture phenyl acetone and amphetamines and to one count of possession of a firearm by a convicted felon. Since the district court failed to properly advise the defendant under Rule 11 as to the drug charge, the Fifth Circuit reversed the entire conviction. It held that, "Since one of the statutes under which Bounds pleaded mandates the imposition of a period of supervised release...[we

must] reverse his conviction, vacate his sentence, and remand so that he may plead anew." *Bounds*, 943 F.2d at 546. This decision is consistent with those of other circuits. In *United States v. McMann*, 940 F.2d 1352 (10th Cir. 1991), the Tenth Circuit found that the district court violated Rule 11 by failing to inform the defendant of the mandatory minimum sentence on one count. The court found that this omission rendered the defendant's multi-count plea involuntary under *McCarthy, supra*, because the defendant was not "fully aware of the consequences of his plea." *McMann*, 940 F.2d at 1358. It therefore vacated McMann's entire plea and ordered him to replead to the indictment. In *United States v. Watley*, 987 F.2d 841 (D.C. Cir. 1993), the defendant received incorrect advice as to the consequences of pleading to a drug conspiracy charge, but correct advice as to the sentence for a gun charge under Section 924(c)(1). The court found that the defendant "was given incorrect information, at and prior to the plea hearing, regarding the sentence he *could possibly* receive." *Watley*, 987 F.2d at 847 (Original emphasis). The court therefore found a Rule 11 violation, granted the defendant's post-sentence motion to withdraw his plea, and vacated both counts to which the defendant pled. See also, *United States v. Scott*, 987 F.2d 261 (5th Cir. 1993).

This aproach is distinguished from those instances where courts have properly vacated only those counts, within multi-count indictments, which involved other types of Rule 11 error and affirmed the remaining counts. In *United States v. Abernathy*, 83 F.3d 17 (1st Cir. 1996), the court vacated Count 2 under Rule 11 because the district court failed to apprise the defendant of an element of that charge, yet affirmed the plea as to Count 1, which involved a different offense. In *United States v. Wetterlin*, 583 F.2d 346 (7th Cir.

1978), *cert. denied*, 439 U.S. 1127, 99 S.Ct. 1033, 59 L.Ed.2d 88 (1979), the court vacated only one count under Rule 11 because the district court failed to properly advise the defendant of the nature of that charge or to establish a factual basis for that count.

These actions were proper because it is clear that substantial rights of the defendants in *Abernthy* and *Wetterlin* as to the affirmed counts were not affected by the Rule 11 violations as to the vacated counts. The same cannot be said for Still's case, where the failure to advise of the mandatory minimum sentence clearly infected the entire plea and adversely affected his substantial rights as to all of the counts to which he pled. Thus, unlike *Abernathy* or *Wetterlin*, it is necessary to vacate Still's plea to all counts. See *United States v. Herndon*, 7 F.3d 55, 58 (5th Cir. 1993) [the question is "whether awareness of a mandatory minimum would have affected the defendant's decision to plead guilty," not whether the mandatory minimum had an effect on the sentence].

The concept of considering a multi-count indictment as a sentencing "package" is not new. Often, courts will resentence a defendant on any affirmed counts after the reversal of convictions on other counts. See, *United States v. Shue*, 825 F.2d 1111 (7th Cir.), *cert. denied*, 484 U.S. 956, 108 S.Ct. 351, 98 L.Ed.2d 376 (1987); *United States v. Busic*, 639 F.2d 940 (3rd Cir.), *cert. denied*, 452 U.S. 918, 101 S.Ct. 3055, 69 L.Ed.2d 422 (1981). This is the flipside of the same coin: the judge considers the "package" to derive a fair sentence, and the defendant considers the "package" in determining the bottom line sentence. A defendant is concerned with how much time he may have to serve, not on which

counts he may serve the time. Simply put, a statutory minimum on one count in a multi-count plea is the statutory minimum for the "package."

This Court has held that sentences based on material misinformation or erroneous assumptions violate due process. *Townsend v. Burke,* 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948); *Larson v. United States,* 835 F.2d 169 (8th Cir. 1987), *cert. denied,* 486 U.S. 1056, 108 S.Ct. 2824, 100 L.Ed.2d 925 (1988). Still agreed to plead guilty in exchange for the dismissal of the indictment against his wife with the understanding that he would have to serve at least a five year minimium sentence. Beyond the five year minimum, Still had the *hope* that he would fare well within a Guideline projection of between seventy to eighty-seven months. However, as a direct result of the Rule 11 violation, this hope was shattered by a statutory reality. This mocks Rule 11. The court of appeals recognized that "Still's rights were substantially affected by the erroneous information regarding the mandatory minimum sentence applicable to count one." *Still* 102 F.3d at 123. It is unreasonable and myopic to maintain that this error did not infect the "package" plea. Still is entitled to replead to the indictment.

B. *The motion to withdraw the guilty plea to the gun charge should have been granted.*

According to Federal Rule of Criminal Procedure 32(e), a district court may permit a defendant to withdraw a guilty plea at any time before sentencing upon a showing of a "*fair and just reason.*" Rule 32 should be liberally applied, although there is no absolute right to withdrawal. *United States v. Benavides,* 793 F.2d 612 (5th Cir.), *cert. denied,* 479 U.S. 868, 107 S.Ct. 232, 93 L.Ed.2d 158(1986).

The court of appeals reasoned, *inter alia*, that the plea was knowing and voluntary under Rule 32, so that Still's motion should be denied. In doing so, the lower court rendered a decision in conflict with other circuits on an important issue: the effect of *Bailey v. United States, supra*. Accordingly, this Court's review of this matter is warranted.

The Court of appeals recognized that Still's plea under the "use" prong of Section 924(c) could not survive *Bailey*. However, it also found that Still "cannot persuasively argue that *Bailey* would have affected his willingness to plead guilty to 'carrying' a firearm because *Bailey* does not address the 'carry' prong of Section 924(c)(1)." *Still*, 102 F.3d at 125.

In *Bailey*, the Court said:

> "We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning. While a broad reading of 'use' undermines virtually any function for 'carry,' a more limited, active interpretation of 'use' preserves a meaningful role for 'carries' as an alternative basis for a charge. Under the interpretation we enunciate today, a firearm can be used without being carried, *e.g.*, when an offender has a gun on display during a transaction, or barters with a firearm without handling it; and a firearm can be carried without being used, *e.g.*, when an offender keeps a gun hidden in his clothing throughout a drug transaction." *Bailey*, ____ U.S. at ____, 116 S.Ct. At 507.

Despite this language, the lower court held that

Bailey had no implications for the "carry" prong. This directly conflicts with other courts' approach to the "carry" prong post-*Bailey*. See, *United States v. Miller*, 84 F.3d 1244 (10th Cir.), *cert. denied*, ____ U.S. ____, 117 S.Ct. 443, ____ L.Ed.2d ____, (1996); *United States v. Giraldo*, 80 F.3d 667 (2nd Cir.), *cert. denied*, ____ U.S. ____, 117 S.Ct. 135, 136 L.Ed.2d 83 (1996); *United States v. Hernandez*, 80 F.3d 253 (9th Cir. 1996); *United States v. Baker*, 78 F.3d 1241 (7th Cir. 1996); and *United States v. Riascos-Suarez*, 73 F.3d 616 (6th Cir.), *cert. denied*, ____ U.S. ____, 117 S.Ct. 136, ____ L.Ed.2d ____ (1996). These cases show that *Bailey* has had a significant impact on the application of the "carry" prong. See *United States v. McMillan*, 914 F.Supp 1387 (E.D. La. 1996) [defendant who pled guilty as one who "used and carried" a firearm allowed to withdraw guilty plea under Rule 32(e) based on *Bailey*].

The only evidence before the trial court in this case was that DEA agents found the firearm in Still's car which was parked in the driveway of his home. Nothing indicates Still carried the gun with him into the motel during the drug transaction. Clearly, given the significant change in the law, Still had a potentially valid defense to the gun charge. It is irrelevant whether or not Still would have ultimately prevailed with the defense that the gun was not "actively" carried as a part of the drug transaction. The reviewing court should not have considered the merits of the defense when determining whether to allow the withdrawal of a guilty plea. *United States v. Webster*, 468 F.2d 769 (9th Cir. 1972). Ultimately, the lower court made its determination by improperly reviewing the merits of Still's potential defense instead of allowing Still to try the defense before a jury. The lower courts dismissed Still's potential defense to the gun

charge simply by determining that the government provided a factual basis to support Still's plea. However, Still was entitled to present his defense to a jury under the reasonable doubt standard.

McCarthy stresses that a guilty plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." 394 U.S. at 466, 89 S.Ct. at 1171. The record below makes clear that after *Bailey* was decided, neither Still, his attorney, the U.S. Attorney, nor the district court fully understood the post-*Bailey* law in relation to the facts. That is why Still moved to withdraw his plea. In short, *Bailey* entitled Still to argue before the jury that he did not "carry" a weapon within the meaning of the statute. For this reason, his guilty plea was not knowingly and voluntarily rendered.

CONCLUSION

Still agreed to plead guilty to all counts of the indictment with the understanding that he faced a minimum sentence of five years. Since he actually faced a ten year minimum sentence, Still did not fully understand the consequences of his plea. Under Rule 11, he is entitled to replead to all counts of the indictment. Additionally, the change in law created by *Bailey* constitutes a fair and just reason to allow Still to withdraw his guilty plea to Count 3. For this reason, his conviction under Count 3 must be vacated.

Respectfully submitted:

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CERTIFICATE OF SERVICE

This is to certify that copies of the Petition for Writ of Certiorari have been served upon the United States of America by placing three copies thereof in the United States Mail, postage prepaid, addressed to The Honorable Walter Dellinger, Solicitor General, Department of Justice, Main Justice Building, Room 5143, Washington D.C. 20530, (202) 514-2000; and by placing three copies thereof in the United States Mail, postage prepaid, addressed to the Honorable Eddie Jordan, United States Attorney for the Eastern District of Louisiana, Hale Boggs Federal Building, 500 Camp Street, New Orleans, Louisiana 70130, (504) 589-2921.

New Orleans, Louisiana, this 7th day of March, 1997.

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Attorney for Petitioner

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Byron STILL, Defendant-Appellant.
No. 96-30009.

United States Court of Appeals,
Fifth Circuit.

Dec. 10, 1996.

Defendant was convicted in the United States District Court for the Eastern District of Louisiana, Morey L. Sear, Chief Judge, on his plea of guilty to one count of conspiracy to possess cocaine with intent to distribute, one count of possession of cocaine with intent to distribute, one count of using and carrying firearm during and in relation to drug trafficking offense and three money laundering offenses. Defendant appealed. The Court of Appeals, Emilio M. Garza, Circuit Judge, held that: (1) district court's failure to inform defendant of correct mandatory minimum sentence applicable to count mandated vacatur of his guilty plea to that charge of conspiracy to possess cocaine with intent to distribute: (2) district court's failure to inform defendant of proper mandatory minimun sentence applicable to conspiracy count did not mandate vacatur of his guilty plea to possession count; and (3) guilty plea to conjunctive charge of using and carrying firearm during and in relation to drug trafficking crime was voluntary and knowing.

Affirmed in part, and vacated and remanded in part.

Francis M. King, Stephen A. Higginson. Assistant U.S. Attorney, Office of the United States Attorney, New Orleans, LA, for plaintiff-appellee.

Arthur A. Lemann, III, Arthur Anthony Lemann, IV, Arthur Lemann III & Associates, New Orleans, LA, for defendant-appellant.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before POLITZ, Chief Judge, and EMILIO M. GARZA and STEWART, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Byron Still pleaded guilty to six counts in a second superseding indictment. Still appeals his guilty pleas to counts one and two on the ground that the district court failed to advise him of the correct mandatory minimum sentence applicable to count one. He also appeals the district court's denial of his motion to withdraw his guilty plea to count three. We affirm in part and vacate in part, remanding to enable Still to replead to count one.

I

Jose Bartolo Menjivar arranged for Jorge Salgado III and a Drug Enforcement Administration ("DEA") cooperating individual ("CI") to transport four kilograms of cocaine from Houston, Texas to a buyer in New Orleans, Louisiana. The CI notified the DEA of the transaction. Upon their arrival at a Days Inn Motel in New Orleans, Salgado and

the CI arranged for Byron Still to purchase the cocaine at the motel. DEA agents observed Still's arrival at the motel where he gave Salgado $20,000 in exchange for the cocaine. DEA agents then followed Still to his home.

The agents searched Still's residence pursuant to a search warrant and arrested him after discovering four kilograms of cocaine in the residence. The agents also discovered a nine millimeter firearm under the front seat of the automobile Still had driven to the exchange with Salgado.

The government charged Still with one count of conspiracy to possess cocaine with intent to distribute in violation of 21 U.S.C. § 846, a second count of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1), a third count of using and carrying a firearm during and in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1), and three money laundering offenses under 18 U.S.C. §§ 1956(a)(1)(A)(i) and 1956(a)(2). Still's wife, Janice Taylor Still, was charged as a co-defendant under counts one and two.

Still pleaded not guilty to the initial indictment, and not guilty to a superseding indictment that added Menjivar and Salgado as defendents under counts one and two. Still also pleaded not guilty to a second superseding indictment that dropped count two as to Janice Still. Ultimately, however, Still changed his mind and pleaded guilty to all counts of the second superseding indictment.

At the rearraingment hearing, the district court informed Still that he faced a maximum sentence of forty years in custody and a mandatory minimum sentence of five years

in custody as to counts one and two based on the four kilograms of cocaine seized at Still's residence. The court also informed Still of the maximum penalties for counts three, four, five and six. During the plea colloquy, the court asked Still whether the sentencing guidelines applicable to his case had been explained to him: Still responded "(n)ot clearly." Because no probation officer was present, Still's attorney and the prosecutor explained to Still during a recess in the hearing that he likely faced a sentencing range of 70 to 87 months.[1] This range presupposed a drug quantity of four kilograms with an adjustment for acceptance of responsibility. Following the recess, Still entered a guilty plea to each count of the indictment.[2]

The district court held sentencing hearings on December 6, 7, 13, and 21, 1995. At the December 6 hearing, the court found that Still had dealt in "at least five kilograms of cocaine," based upon the four kilograms seized at Still's residence at the time of his arrest and upon relevant conduct separate from the charged offenses.[3] The

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[1] The record is unclear regarding whether Still's attorney and the prosecutor represented to Still that he faced a range of 70-87 months on counts one, two, four, five and six, in addition to the consecutive sixty month sentence on count three, or whether they failed to mention the sixty month sentence to Still. The record is clear, however, that the district court informed Still that he faced a consecutive sixty month sentence on count three.

[2] At the close of the rearraignment hearing the government moved to dismiss the indictment against Janice Still; the district court granted the motion. Although no plea agreement was entered in this case and the government denied that one existed. Still stated at the plea hearing that the government's dismissal of the indictment against his wife influenced his decision to plead guilty.

[3] *See* United States Sentencing Commission, *Guidelines, Manual*, § 1B1.3(a)(1) (Nov. 1994) [hereinafter USSG] (describing relevant conduct

district court's finding that Still had dealt in at least five kilograms of cocaine triggered a mandatory minimum sentence of ten years as to count one, rather than the five year mandatory mimimum of which Still had been informed at the rearraignment hearing. Because the district court's quantity finding differed from the amount of cocaine upon which the Probation Officer had based her sentencing report, the district court continued the sentencing hearing to December 7 to permit the Probation Officer to recompute Still's sentencing range.[4]

On December 7, however, the court again rescheduled the sentencing hearing to permit the parties to analyze the effect, if any, of the Supreme Court's December 6 decision in *Bailey v. United States*, ___ U.S.___, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), on Still's guilty plea to count three. At the December 13 hearing, Still moved to withdraw his guilty plea to that count. The district court again continued the sentencing to allow the parties to submit briefs regarding *Bailey's* effect on Still's guilty plea to count three. At the final sentencing hearing on December 21, the court denied Still's motion to withdraw his plea to count three and imposed

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footnote 3 continued

that determines Guidelines sentencing range); *see* also USSG § 1B1.3, comment (n.2) ("With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved....").

[4] The Probation Officer had computed Still's sentencing range based upon 110 kilograms of cocaine. The Probation Officer derived this amount from the four kilograms seized at Still's residence at the time of his arrest and from relevant conduct revealed by Still's alleged statements at the time of his arrest that he had dealt in two kilograms of cocaine every other week for the 24 months preceding his arrest. At the December 6 hearing, Still denied making these statements, although he admitted that he dealt in a total of five kilograms of cocaine prior to his arrest.

sentence. The court grouped the drug counts with the money laundering counts pursuant to § 3D1.2 of the Guidelines,[5] and sentenced Still to concurrent terms of imprisonment of 121 months on counts one, two, four, five and six and to a consecutive term of imprisonment of sixty months on count three.[6] Still appeals.

II

[1,2] Still challenges his guilty pleas to counts one and two of the second superseding indictment,[7] arguing that the

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[5] In determining Still's sentencing range, the district court may have erroneously adopted the Probation Officer's grouping of counts one and two with counts four, five and six as directed by § 3D1.2 of the Guidelines. The Probation Officer recognized that our decision in *United States v. Gallo*, 927 F.2d 815, 824 (5th Cir.1991), suggests that drug distribution activity and money laundering activity invade distinct social interests and thus should not be grouped under § 3D1.2, yet grouped these counts pursuant to § 3D1.2.

This apparent conflict had no effect in this case, however. Section 3D1.4(c) of the Guidelines directs the sentencing court to "[d]isregard any Group that is 9 or more levels less serious than the Group with the highest offense level, "as counts four, five and six were here. Thus, the total offense level here remained the same whether counts four, five and six were grouped with counts one and two.

[6] The court also ordered Still to pay an $8,000 fine and a $300 special assessment, and sentenced Still to a five-year term of supervised release for count one, a four-year term of supervised release for count two, and to three-year terms of supervised release for counts three through six, all to run concurrently.

[7] In his reply, Still asserts that the district court's alleged Rule 11 error mandates vacatur of his pleas to all six counts of the indictment. *See Reply* at 2, 4. However, "[a]n appellant abandons all issues not raised and argued in its *initial* brief on appeal." *Cinel v. Connick*, 15 F.3d 1338, 1345 (5th Cir.) (emphasis in original), *cert. denied*, ____U.S.____, 115 S.Ct. 189, 130 L.Ed.2d 122 (1994). Thus, we consider only Still's argument that the district court's failure to inform him of the proper mandatory minimum

district court's failure to inform him of the proper mandatory minimum sentence applicable to count one violated FED.R.Crim. P. 11.[8] When an appellant claims that a district court has failed to comply with Rule 11,[9] we "conduct a straightforward, two-question 'harmless error' analysis: (1) Did the sentencing court in fact vary from

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footnote 7 continued

sentence applicable to count one requires vacatur of his guilty pleas to counts one and two.

8 Rule 11 provides, in pertinent part:

> (c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform the defendant of and determine that the defendant understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penality provided by law, including the effect of any special parole or supervised release term, the fact that the court is required to consider any applicable sentencing guidelines but may depart from those guidelines under some circumstances, and, when applicable, that the court may also order the defendant to make restitution to any victim of the offense....

FED.R.CRIM.P. 11(c)(1).

9 Although Still did not explicity raise his Rule 11 argument in the district court and acknowledged at oral argument that the Rule 11 error was not recognized until after his pleas and sentencing, Still's attorney did bring the general issue of Still's understanding of the consequences of his pleas to the district court's attention at the December 21 sentencing hearing. In any event, a claim of non-compliance with Rule 11 will not be deemed waived even if a party fails to present it in the district court. *United States v. Coronado*, 554 F.2d 166, 170 n.5 (5th Cir.) ("[C]laims of noncompliance with rule 11 must be resolved solely on the basis of the rule 11 transcript.... We can therefore adjudicate rule 11 challenges on direct appeal without an initial presentation of the particular arguments to the district court."). *cert. denied*, 434 U.S. 870, 98 S.Ct. 214, 54 L.Ed.2d 149 (1977).

the procedures required by Rule 11, and (2) if so, did such variance affect substantial rights of the defendant?" *United States v. Johnson*, 1 F.3d 296, 298 (5th Cir.1993) (en banc).

A

[3] Still argues, and the govenment concedes, that the district courts failure to inform Still of the correct mandatory minimum sentence applicable to count one mandates vacatur of Still's plea to that charge. We agree.

The district court informed Still that he was subject to a mandatory minimum sentence of five years in custody for counts one and two. However, at the time of the Rule 11 colloquy, the quantity of cocaine for which Still would be held responsible had not yet been determined. When the district court determined at the December 6 sentencing hearing that Still would be held responsible for "at least five kilograms" of cocaine, the mandatory minimum sentence applicable to count one became ten years rather than five pursuant to 21 U.S.C. § 841(b).

Applying our *Johnson* standard, we conclude that the district court varied from the procedures required by Rule 11 when it failed to inform Still of the mandatory minimum sentence to which he could be subject under count one. This error certainly misled Still as to the statutory minimum and "thereby amounted to a complete failure to address the plea-consequences concern of Rule 11." *United States v. Watch*, 7 F.3d 422, 429 (5th Cir.1993). Moreover, Still's rights were substantially affected by the erroneous information regarding the mandatory minimum sentence applicable to count one. *See id.* (holding that "because the district court failed

to inform Watch of the minimum sentence which might be imposed, Watch did not fully understand the consequences of his plea, and his rights were therefore substantially affected"). As a result, Still's plea to count one must be vacated and the case remanded to enable Still to plead to this count again. *See id.* (vacating and remanding to permit defendant to plead anew).

B

Still also argues that the district courts failure to inform him of the proper mandatory minimum sentence applicable to count one mandates vacatur of his guilty plea to count two. He contends that the district court's misstatement regarding the mandatory minimum sentence applicable to count one infected his plea to count two because "the mandatory minimum sentence [he] faced clearly was a material factor that affected his decision to plead guilty" because he pleaded guilty "with the understanding that he faced a range of 70 to 87 months under the Sentencing Guidelines."[10]

In response, the government maintains that Still's convictions are individual and that each count of the indictment is "independent and divisible." The government contends that Still's conviction on count two should be affirmed because Still received correct information regarding the penalties applicable to count two and thus no Rule 11 error occurred with respect to that count.

[4] To analyze Still's claim, we first address the initial

[10] We note that Still's argument is inaccurate to the extent it equates counsel's statements regarding a possible sentencing range with the district court's responsibilities under Rule 11.

prong of our harmless error test, i.e., whether the district court varied from the procedures required by Rule 11. As noted, Rule 11 directs the district court to inform the defendant of, and determine that the defendant understands, "the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law...." FED.R.CRIM.P. 11(c). Rule 11(c) by its terms does not contemplate overlap of the counts, but rather speaks in terms of individual "charge[s] to which plea[s] [are] offered." Thus, a plain reading of Rule 11 requires the district court to inform the defendant of the nature of the charge to which the defendant is pleading, any mandatory minimum penalty, and the maximum possible penalty applicable to each count to which the defendant is pleading guilty.

[5] In this case, the district court complied with the Rule 11 procedures with respect to count two when it informed Still of the correct maximum and mandatory minimum sentences applicable to that count. Thus, applying the two-part standard of review to the individual charges to which Still pleaded, we conclude that the facts of this case do not satisfy the threshold inquiry because the district court did not vary from the procedures required by Rule 11 with respect to count two. *See Johnson*, 1 F.3d at 302 (explaining that we do not reach an analysis of whether sentencing court's variance from procedures required by Rule 11 affected substantial rights of defendant until we find that sentencing court actually varied from mandated procedures).

III

[6] Still also appeals the district court's denial of his

motion pursuant to FED.R.CRIM. P. 32(e) to withdraw his guilty plea to count three. A motion to withdraw a guilty plea is committed to the discretion of the district court and its decision will not be disturbed absent an abuse of discretion. *United States v. Benavides*, 793 F.2d 612, 616 (5th Cir.), *cert. denied*, 479 U.S. 868, 107 S.Ct. 232, 93 L.Ed.2d 158 (1986).

[7,8] Upon a showing of a "fair and just reason," a district court may permit a defendant to withdraw a guilty plea at any time before sentencing.[11] FED.R.CRIM. P. 32(e); *Benavides*, 793 F.2d at 616. Though Rule 32 is to be construed and applied liberally, there is no absolute right to withdraw a guilty plea. *Benavides*, 793 F.2d at 616. In ruling on the motion, the district court considers: (1) whether the defendant has asserted his innocence; (2) whether withdrawal would prejudice the government; (3) whether the defendant delayed in filing the motion, and, if so, the reason for the delay; (4) whether withdrawal would substantially inconvenience the court; (5) whether close assistance of counsel was available to the defendant; (6) whether the plea was knowing and voluntary; and (7) whether withdrawal would waste judicial resources. *United States v. Hurtado*, 846 F.2d 995, 997 (5th Cir.), *cert. denied*, 488 U.S. 863, 109 S.Ct. 163, 102 L.Ed.2d 133 (1988).

[9] However, no single factor or combination of factors

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11 Rule 32(e) provides in relevant part:

> If a motion to withdraw a plea of guilty or nolo contendere is made before sentence is imposed, the court may permit the plea to be withdrawn if the defendant shows any fair and just reason.

FED.R.CRIM. P., 32(e).

mandates a particular result. *United States v. Badger,* 925 F.2d 101, 104 (5th Cir.1991). Instead, the district court should make its determination based on the totality of the circumstances. *Id.* The burden of establishing a fair and just reason for withdrawing a guilty plea remains at all times on the defendant. *Id.; Hurtado,* 846 F.2d at 997.

[10] Here, Still argues that the Supreme Court's opinion in *Bailey v. United States,* ____U.S.____, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), issued between the time of Still's plea and his sentencing, rendered his plea unknowing and involuntary because Bailey changed the law regarding the "use" prong of § 924(c)(1).[12] Reasoning that "Congress used two terms ("use" and "carry") because it intended each term to have a particular, nonsuperflous meaning;" *id.* at ____, 116 S.Ct. at 507, the Supreme Court held in *Bailey* that a conviction under the "use" prong of 18 U.S.C. § 924(c)(1) requires evidence sufficient to show an active employment of a firearm by the defendant. *Id.* at ____, 116 S.Ct. at 505.

Bailey does not, however, address the "carry" prong of § 924(c)(1). *See United States v. Cox,* 83 F.3d 336, 342 (10th Cir. 1996) ("*Bailey* addresses the requirements for using a firearm; whereas defendant was charged with and convicted of carrying firearms.... *Bailey,* therefore, does not apply to this case."). Thus, our prior precedent analyzing that prong is unaffected by the *Bailey* holding. *See United States v. Rivas,*

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[12] Section 924(c)(1) provides in pertinent part:

> Whoever, during and in relation to any crime of violence or drug trafficking crime ... for which he may be prosecuted in a court of the United States, *uses or carries* a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years....

18 U.S.C. § 924(c)(1) (West Supp.1996) (emphasis added).

85 F.3d 193, 195 (5th Cir.1996) ("As recognized by the Eleventh Circuit, because *Bailey* did not address the 'carrying' requirement, prior precedent analyzing that prong was 'not affected.' " (quoting *United States v. Farris*, 77 F.3d 391, 395 n. 4 (11th Cir.), *cert. denied*, ____ U.S. ____, 117 S.Ct. 241, 136 L.Ed.2d 170 (1996)), *cert. denied*, 65 U.S.L.W. 3415, ____ U.S. ____, ____ S.Ct. ____, ____ L.Ed.2d ____ (U.S. Dec. 9, 1996) (No. 96-6558).

[11,12] In this case, Still pleaded guilty to a conjunctive charge of "us[ing] *and* carry[ing] a firearm ... during and in relation to the commission a drug trafficking crime." A disjunctive statute may be pleaded conjunctively and proven disjunctively. *United States v. Johnson*, 87 F.3d 133, 136 n. 2 (5th Cir.1996); *see also United States v. Ruiz*, 986 F.2d 905, 911 (5th Cir.), *cert. denied*, 510 U.S. 848, 114 S.Ct. 145, 126 L.Ed.2d 107 (1993). In other words, despite having charged Still with "using *and* carrying" a firearm during and in relation to a drug trafficking crime, the government had only to prove that Still "used *or* carried" a firearm to convict Still of count three. When Still pleaded guilty to count three, he admitted both to using and to carrying a firearm during and in relation to a drug trafficking crime. Thus, though Still now contends that *Bailey* would have affected his willingness to plead guilty to "using" a firearm, he cannot persuasively argue that *Bailey* would have affected his willingness to plead guilty to "carrying" a firearm because *Bailey* does not address the "carry" prong of § 924(c)(1). As a result, the district court did not abuse its discretion in finding that Still's plea to count three was voluntary and knowing.[13]

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[13] Still argues that *United States v. Presley*, 478 F.2d 163 (5th Cir.1973), mandates reversal of the district court's denial of his motion to withdraw his plea. In *Presley*, we held that appellants whose pleas of nolo contendere to charges of violations of the Travel Act. 18 U.S.C. § 1952, were called

Still also contends that the other *Hurtado* factors support his request to withdraw his plea. Cognizant that no single factor or combination of factors mandates a particular result, and that Still bears the burden of establishing a fair and just reason for withdrawal of his plea, *Badger*, 925 F.2d at 104, we find that the remaining factors do not demonstrate that the district court abused its discretion in denying Still's motion to withdraw his plea.

[13] First, though Still contends that he asserted his innocence to the gun charge at the December 6 sentencing hearing, the record does not support Still's characterization of his discussion with the court. Still told the district court that he believed that rather than receiving a consecutive sixty month sentence on the gun charge, he should receive a two-point increase for use of the gun. At the two subsequent sentencing hearings, Still's attorney argued that Still "had some reservations about the gun charge. He did not feel as if the gun charge applied to him...." He also argued that Still "never felt that the gun charge applied to the facts and circumstances of his particular case." We are not convinced that these statements by Still and his attorney rise to the level of an assertion of innocence to the charge.

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footnote 13 continued

into question by a Supreme Court decision issued between entry of their pleas and their sentencings "should have been permitted to withdraw their pleas of nolo contendere and to go to trial before a jury on pleas of not guilty." *Id.* at 168.

Presley is not analogous to the present case, however. *Bailey* does not bear on Still's plea to carrying a firearm during and in relation in a drug trafficking crime because *Bailey* does not address that crime: *Bailey* affects only Still's plea to using a firearm. *See supra* at 1079-80.

Furthermore, at the rearraignment hearing Still agreed with the government's statement of the evidence against him, which included the statement that "Still had a nine millimeter pistol with him in the car during the transportation of the cocaine." DEA agents discovered the weapon under the front seat of the automobile Still had driven to and from the drug transaction. In addition. DEA Special Agent Charles Stevens testified that Still told him that the firearm was in Still's possession while Still drove the vehicle to and from the exchange.

[14] We have held that the "carry" prong of § 924(c)(1) is met "if the operator of the vehicle knowingly possesses the firearm in the vehicle during and in relation to a drug trafficking crime." *United States v. Pineda-Ortuno*, 952 F.2d 98, 104 (5th Cir.), *cert. denied*, 504 U.S. 928, 112 S.Ct. 1990, 118 L.Ed.2d 587 (1992); *see also United States v. Fike*, 82 F.3d 1315, 1328 (5th Cir.) ("In placing a gun under the driver'seat of a car, then driving the car to another location, one has carried the gun.... This, in our view, satisfies § 924(c)'s carrying requirement."). *cert. denied*, ____ U.S. ____, 117 S.Ct. 241, 136 L.Ed.2d 170 (1996), *and cert. denied*, ____ U.S. ____, 117 S.Ct. 242, 136 L.Ed.2d 170 (1996); *United States v. Speer*, 30 F.3d 605, 612 (5th Cir.) ("The 'carrying' requirement of § 924(c) is met where a defendant operates a vehicle knowing the firearm is in the car."). *cert. denied*, ____ U.S. ____, 115 S.Ct. 603, 130 L.Ed.2d 514 (1994), *and cert. denied*, ____ U.S. ____, 115 S.Ct. 768, 130 L.Ed.2d 664 (1995). The government presented ample evidence, to which Still admitted, that he "carried" a firearm during and in relation to a drug trafficking crime in violation of § 924(c) as that provision has been interpreted by this court. In any event, a claim of innocence, by itself, does not justify withdrawal of a plea. *Hurtado*, 846 F.2d at 997.

[15] Still next contends that the government would not be prejudiced by withdrawal of his plea. Whatever the truth of this assertion, an "absence of a showing of prejudice by the government is not sufficient to require withdrawal of the plea where 'no credible reason is proffered.' " *Benavides*, 793 F.2d at 617 (quoting *United States v. Rasmussen*, 642 F.2d 165, 168 n. 6 (5th Cir.1981)). As discussed previously, Still has not proffered a credible reason for withdrawal.

[16, 17] Still also argues that the district court erred in denying his motion because he moved promptly to withdraw his plea after the issuance of *Bailey*, because he had able counsel throughout his plea and sentencing hearings, and because a trial on count three would not inconvenience the district court or waste its resources. That Still moved promptly to withdraw his plea and that the district court may not be inconvenienced by a trial do not establish that the district court abused its discretion by denying Still's motion. *See Badger*, 925 F.2d at 104 (stating that even if factors of government prejudice, inconvenience to court, and waste of judical resources weighed in Badger's favor, "they do not tip the scales to the extent necessary to find an abuse of discretion"). The fact that Still had able counsel throughout his plea and sentencing hearings weighs against withdrawal of his plea. *See id.* (finding that fact that defendant "was ably and effectively" represented by counsel throughout procedings supported district court's refusal to permit plea withdrawal).

In sum, these factors do not demonstate that the district court abused its discretion in denying Still's motion to withdraw his guilty plea to count three. Rather, the totality of the circumstances surrounding Still's plea demonstrates

that Still did not carry his burden of establishing a fair and just reason for withdrawal of the plea.

IV

For the foregoing reasons, we VACATE Still's plea to count one and REMAND to permit Still to plead anew to that count. We AFFIRM Still's plea to count two and AFFIRM the district court's denial of his motion to withdraw his plea to count three.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

436-11-6306
(SOC. SEC. NO.)

UNITED STATES of AMERICA
vs. BYRON J. STILL
4501 Mendez
New Orleans, La. 70126

CRIMINAL ACTION
95-95-1 "G"
(CASE NO. SEC.)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendent appeared in person on this date.....

Month	Day	Year
(December	21	1995)

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

___WITHOUT COUNSEL

X WITH COUNSEL Ike Spears 1555 Poydras St., Suite 1710 NOLA 70112
(Name of Counsel)

Court Reporter's Name: Audrey Steward
PLEA: X GUILTY and the court being satisfied that there is a factual basis for the plea.

___NOLO CONTENDERE ___NOT GUILTY

There being a finding of (X GUILTY on August 31, 1995.

Defendant has been convicted as charged of the offense(s) of 21 USC 846; 841;
18 USC 1956; 924
SECOND SUPERSEDING INDICTMENT FOR VIOLATION OF THE FEDERAL CONTROLLED SUBSTANCES ACT. FEDERAL FIREARMS LAWS, AND MONEY LAUNDERING (Counts 1-6)

The sentence is imposed pursuant to the Sentencing Reform Act of 1984. The court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 121 months as to Counts 1,2,4,5 and 6, to be served concurrently. As to Count 3, the defendant Byron J. Still is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 60 months, to run consecutively to the terms imposed in Counts 1,2,4,5, and 6. IT IS FURTHER ORDERED that the defendant shall pay to the United States a fine of $8,000.00 as to Counts 1 through 6. The payment of the fine of $8,000.00 shall begin while the defendant is incarcerated. Upon release, any unpaid balance shall be paid at a rate of $50.00 per month. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five years, consisting of a term of five years on Count 1, four years on Count 2 and terms of three years on each of Counts 3,4,5, and 6, all such terms to run concurrently. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall

report in person to the probation office in the district to which the defendant is released. While on supervised release, the defendant shall comply with the standard general conditions that have been adopted by this Court along with the following additional conditions: 1) The defendant shall provide the probation officer with access to any requested financial information; 2) The defendant shall participate in a program of testing and/or treatment for drug abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer. The defendant shall contribute to the cost of such treatment to the extent that the defendant is deemed capable by the probation officer; 3) The defendant shall pay any fine that is imposed by this Judgment. On motion by the Government IT IS ORDERED that the underlying indictments are dismissed.

IT IS FURTHER ORDERED that the defendant shall pay to the United States a special assessment of $50.00 as to Count(s) 1 - 6 , for a total assessment of $300.00
IT IS FURTHER ORDERED that the defendant notify the United States Attorney for this District within 30 days of any change of residence or mailing address until all fines, restitution, costs and special assessments imposed by this Judgment are fully paid. In addition to the special conditions of probation imposed above, **IT IS HEREBY ORDERED** that the general conditions of probation/supervised release set out on the reverse side be imposed.

IT IS FURTHER ORDERED:

( ) The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

( ) The Court has determined that the defendant does not have the ability to pay interest. The interest requirement is (waived) (modified as follows):

SIGNED BY:

___
XX U.S. District Judge
___ U.S. Magistrate Illegible

CERTIFIED AS A TRUE COPY
ON THIS DATE 12-22-95

BY: Illegible
Deputy Clerk

(Date) December 21, 1995

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this judgment, the defendant shall not commit another federal, state or local crime. In addition:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully, all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer within seventy-two hours prior to any change in residence and within seventy-two hours of any change in employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate

with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

The court makes the following recommendation to the Bureau of Prisons:

IT IS ORDERED that the clerk delivered a certified copy of this Judgment and Commitment to the U.S. Marshal or other qualified officer.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

_____
Deputy Marshal

FILED
JUN 6

No. 96-1440

In the Supreme Court of the United States

OCTOBER TERM, 1996

BYRON STILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
JOHN C. KEENEY
Acting Assistant Attorney General
THOMAS E. BOOTH
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals correctly affirmed petitioner's conviction on his plea of guilty to a substantive drug count as to which the district court complied with Federal Rule of Criminal Procedure 11, even though the court of appeals vacated petitioner's conviction on a separate drug conspiracy count as to which the district court had failed to comply with Rule 11.

2. Whether the district court abused its discretion by denying petitioner's motion to withdraw his plea of guilty to a charge of using and carrying a firearm during and in relation to a drug trafficking offense under 18 U.S.C. 924(c).

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In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1440

BYRON STILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is reported at 102 F.3d 118.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1996. The petition for a writ of certiorari was filed on March 10, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the United States District Court for the Eastern District of Louisiana, petitioner pleaded guilty to conspiracy to trafficking in cocaine, in violation of 21 U.S.C. 846; possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); using and carrying a firearm during and in relation to

a drug trafficking offense, in violation of 18 U.S.C. 924(c); and three money laundering offenses, in violation of 18 U.S.C. 1956(a)(1)(A)(i) and 18 U.S.C. 1956(a)(2). He was sentenced to 121 months' imprisonment on the drug and money laundering counts, and to a mandatory consecutive 60-month term on the firearm count. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. A1-A17.

1. In February 1995, during a federal undercover operation, petitioner purchased four kilograms of cocaine for $20,000 at a motel in New Orleans. Federal agents followed petitioner from the motel to his residence. After detaining him, the agents executed a search warrant and found the four kilograms of cocaine in his house. The agents also searched the car that petitioner had driven to the motel and found a nine millimeter firearm under the front seat. Pet. App. A2-A3.

Petitioner pleaded guilty to all charges in the indictment. At the plea hearing, the district court informed petitioner that, based on his purchase of four kilograms of cocaine, he faced a mandatory minimum prison sentence of five years and a maximum sentence of 40 years on the drug conspiracy and the substantive drug counts. The court also informed petitioner of the maximum penalties for the firearm and money laundering offenses. Petitioner understood that his sentencing range under the Guidelines for those offenses was 70 to 87 months' imprisonment, and also that the firearm charge carried a mandatory consecutive sentence of five years' imprisonment. Pet. App. A3-A4.

At sentencing, the district court found that petitioner was responsible for five kilograms of cocaine—four kilograms from the purchase that led to his

convictions and one kilogram based on relevant conduct separate from the charged offenses. The finding that petitioner was accountable for five (and not four) kilograms of cocaine increased his mandatory minimum sentence on the drug conspiracy charge from five to ten years. See 21 U.S.C. 841(a), 846. That finding, however, did not affect the five-year mandatory minimum sentence on the substantive drug charge. See United States Sentencing Comm'n, *Federal Sentencing Guidelines Manual* App. E. at 877 (1994-1995 ed.) ("[T]he mandatory minimum penalty provisions of section 841(b) are based solely upon the amount of drugs that the court finds was actually involved in the substantive distribution count."). The district court continued the sentencing hearing to permit the probation office to recompute petitioner's sentencing range, but the court did not advise petitioner of the change to the mandatory minimum on the drug conspiracy charge. Pet. App. A4-A5.

While petitioner was awaiting sentencing, this Court held in *Bailey* v. *United States*, 116 S. Ct. 501 (1995), that, to be convicted under 18 U.S.C. 924(c) of "using" a firearm "during and in relation to" a crime of violence or a drug trafficking crime, a defendant must actively employ the firearm: mere possession and accessibility of the firearm does not constitute a "use" under the statute. Petitioner moved to withdraw his guilty plea to the firearm charge based on the decision in *Bailey*. The district court denied the motion. Pet. App. A5-A6.

In calculating petitioner's sentence, the district court grouped the drug and money laundering charges and sentenced petitioner to 121 months' imprisonment on those counts. The court also imposed

the statutory five-year consecutive sentence on the firearm count. Pet. App. A6.

2. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. A1-A17. The court first held that the district court had violated Federal Rule of Criminal Procedure 11(c) by failing to inform petitioner of the correct mandatory minimum sentence on the drug conspiracy count. The court accordingly vacated the conspiracy conviction and remanded to permit petitioner to replead to that count. *Id.* at A8. The court, however, rejected petitioner's argument that the district court's Rule 11 error on the conspiracy count also required vacatur of petitioner's conviction on the substantive drug count.[1] The court observed that the language of Rule 11 "speaks in terms of individual" charges and "does not contemplate overlap of the counts." *Id.* at A10. Here, the court reasoned, the district court had informed petitioner of the correct mandatory minimum and maximum sentences on the substantive drug count, and so there was no violation of Rule 11 with respect to that count. *Ibid.*

The court also held that the district court had not abused its discretion by denying petitioner's motion to withdraw his plea on the firearm charge. According to the court, *Bailey* did not require vacatur of his guilty plea to the Section 924(c) count, because that decision speaks only to the showing needed to establish "use" of a firearm, and petitioner's firearm

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[1] The court did not consider petitioner's argument that his firearm and money laundering convictions should be vacated as well, ruling that petitioner had waived his challenge to those convictions by not challenging them until his reply brief. Pet. App. A6 n.7.

conviction was proper under the "carry" prong of Section 924(c). The court emphasized that the indictment charged petitioner with both "us[ing]" and "carry[ing]" a firearm, and that petitioner admitted that he both used and carried the firearm during his drug offense. Moreover, petitioner had agreed with the government's account of the evidence against him, which included a statement that he had a pistol with him in the car while he transported the cocaine. Finally, a federal agent had testified that petitioner admitted that the firearm was in his possession when he drove his car to and from the purchase. Pet. App. A13-A15.

ARGUMENT

1. Petitioner contends (Pet. 5-11) that the district court's erroneous advice concerning the mandatory minimum sentence applicable to the drug conspiracy charge vitiated his entire plea. That contention is without merit.

Under Federal Rule of Criminal Procedure 11(c)(1), before accepting a defendant's guilty plea, a district court must "inform the defendant of, and determine that the defendant understands," *inter alia*, "the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law." Any variance from those requirements is disregarded if it does not affect the defendant's substantial rights. Fed. R. Crim. P. 11(h).

As the court of appeals recognized (Pet. App. A10), Rule 11(c) contemplates that the district court will separately inform the defendant of the maximum penalty, minimum penalty, and nature of each "charge to which the plea is offered." Fed. R. Crim. P. 11(c)(1);

see *United States* v. *Wetterlin*, 583 F.2d 346, 353 (7th Cir. 1978) ("[I]n order for the rule to accomplish its intended purpose it is essential for the district judge to inform the defendant of and determine that he understands the nature of each particular charge and the maximum possible penalty as to that charge, i.e., he should comply with Rule 11(c)(1) as to each individual charge for which a plea of guilty is offered."), cert. denied, 439 U.S. 1127 (1979). As a result, when a defendant who has pleaded guilty to multiple counts challenges his plea on the ground that the district court failed to comply with Rule 11, each count should be analyzed individually to determine whether there was a violation: a Rule 11 error with respect to one count of conviction does not automatically undermine the validity of other counts of conviction as to which there was no error. See, *e.g.*, *United States* v. *Abernathy*, 83 F.3d 17, 19-20 (1st Cir. 1996); *United States* v. *Darling*, 766 F.2d 1095, 1097-1100 (7th Cir.), cert. denied, 474 U.S. 1024 (1985); *Wetterlin*, 583 F.2d at 351-355.

Under those principles, the court of appeals correctly affirmed petitioner's conviction on the substantive drug charge in this case, even though it vacated his conviction on the drug conspiracy charge.[2] The

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[2] The court of appeals correctly ruled that petitioner waived his challenge to the validity of the money laundering and firearm charges by not raising that claim in his initial brief. See, *e.g.*, *United States* v. *Davis*, 52 F.3d 781, 783 (8th Cir. 1995); *United States* v. *Mitchell*, 31 F.3d 628, 633 n.3 (8th Cir. 1994); *Nagle* v. *Alspach*, 8 F.3d 141, 143 (3d Cir. 1993), cert. denied, 510 U.S. 1215 (1994). Although petitioner contends (Pet. 7 n.3) that his challenge to those counts was properly preserved, his fact-bound disagreement with the finding of the court of appeals merits no review.

reason is that, even though the district court violated Rule 11 with respect to the conspiracy charge, thereby justifying vacatur of that conviction, the court complied with Rule 11 as to the substantive drug charge by informing petitioner of the correct minimum and maximum sentences applicable to that count. See Pet. App. A10. There was therefore no error in the guilty plea proceedings that led to the entry of the substantive drug conviction.

Petitioner's reliance (Pet. 9) on *United States* v. *McMann*, 940 F.2d 1352 (10th Cir. 1991), and *United States* v. *Watley*, 987 F.2d 841 (D.C. Cir. 1983), is misplaced. Petitioner is correct in suggesting that, in both cases, the courts of appeals found a Rule 11 error because the trial courts had furnished erroneous information about the sentence applicable to one count of conviction, and also that the judgments of the courts of appeals in both cases vacated counts of conviction in addition to the particular count that was the subject of the Rule 11 error. Both decisions arrived at that result, however, without any discussion, and neither case held that, as a general matter, a Rule 11 violation with respect to one count of conviction requires vacatur of other counts of conviction as to which there was no Rule 11 error. Nor have any other courts of appeals expressly addressed that issue in any decision.

In addition, in both *Watley* and *McCann*, the defendants' decision to plead guilty to multiple counts was pursuant to a plea agreement under which other charges were dismissed. See *Watley*, 987 F.2d at 842; *McCann*, 940 F.2d at 1354. In that situation, the courts' decision to vacate the entire plea may have been premised on a conception of the plea agreement as an aggregate bargain that must stand or fall as a

whole. Cf. Fed. R. Crim. P. 11(e)(4) (allowing defendant to withdraw plea if plea agreement is rejected by the court). Here, by contrast, petitioner had not entered into a plea agreement. Pet. App. A4 n.2.[3]

2. Petitioner also contends (Pet. 11-14) that the district court erred in denying his motion to withdraw his plea to the firearm count. That fact-bound claim merits no further review.

Under Federal Rule of Criminal Procedure 32(e), a district court may allow a defendant to withdraw a guilty plea before sentencing for a "fair and just reason." The court's decision is reviewed for abuse of discretion. See, *e.g.*, *United States* v. *Jones*, 87 F.3d 954, 956 (7th Cir. 1996); *United States* v. *Cray*, 47 F.3d 1203, 1206 (D.C. Cir. 1995). According to petitioner, the district court abused its discretion here by refusing to allow him to withdraw his guilty plea to the Section 924(c) charge in light of this Court's decision in *Bailey* v. *United States*, 116 S. Ct. 501 (1995), which defines the circumstances in which a defendant may be convicted for "using" a firearm in violation of that statute.

Here, however, the indictment charged petitioner with both "using" and "carrying" a firearm under Section 924(c), and petitioner pleaded guilty to violating both prongs of the statute. Pet. App. A13. As a result, his plea of guilty may be upheld if there is an adequate factual showing that he "carried" a firearm

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[3] Petitioner contends (Pet. 8-9) that the decision of the Fifth Circuit below conflicts with that court's own decisions in *United States* v. *Bounds*, 943 F.2d 541 (1991), and *United States* v. *Scott*, 987 F.2d 261 (1993). Any such conflict does not warrant review by this Court and is for the Fifth Circuit itself to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

within the meaning of Section 924(c), irrespective of whether his conduct constitutes "use" of a firearm after *Bailey*. See *e.g.*, *United States* v. *Mitchell*, 104 F.3d 649, 653-654 (4th Cir. 1997); *United States* v. *Riascos-Suarez*, 73 F.3d 616, 622-624 (6th Cir.), cert. denied, 117 S. Ct. 136 (1996); see also *United States* v. *White*, 81 F.3d 80, 83-84 (8th Cir. 1996); cf. *Thomas* v. *United States*, 112 F.3d 365 (8th Cir. 1997) (no prejudice from failure to appeal motion to withdraw guilty plea to Section 924(c) charge after *Bailey* because evidence was sufficient to establish violation of the statute under the "carry" prong).

As the court of appeals correctly found (Pet. App. A15), there was a factual basis for petitioner's plea under the "carry" prong of Section 924(c). The government's statement of the evidence showed that petitioner kept the firearm under the front seat of his car while he transported the cocaine from the motel to his residence, and law enforcement agents seized the firearm from the car after his arrest. Moreover, petitioner admitted that he possessed the firearm while driving to and from the motel. Petitioner's transportation of the firearm in his car constituted a "carry" of that firearm under Section 924(c). See *Mitchell*, 104 F.3d at 653; *United States* v. *Fike*, 82 F.3d 1315, 1328 (5th Cir.), cert. denied, 117 S. Ct. 241, 242 (1996), 117 S. Ct. 1280 (1997).[4] Under those circumstances,

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[4] Any question whether the "carry" prong of Section 924(c) requires that the firearm be readily accessible to the defendant, see *Mitchell*, 104 F.3d at 653, is not presented here. The firearm that was found in the front seat of petitioner's car was readily accessible to him. See *Riascos-Suarez*, 73 F.3d at 623.

the district court did not abuse its discretion by denying petitioner's motion to withdraw his plea.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1997

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[5] Petitioner's reliance (Pet. 13) on cases in which the courts of appeals have reversed Section 924(c) convictions in light of *Bailey* based upon faulty jury instructions or insufficiency of the evidence is misplaced. Those cases have no bearing on the issue whether there exists a sufficient factual basis for a guilty plea to a Section 924(c) charge.